SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 534

CARMEN BENCOMO,

Petitioner,

vs.

WILL C. BENCOMO,

Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida was reported in 200 So2d 171.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Sec. 1257(3) in that a right is claimed under the 14th Amendment of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of relevant Statutes are set forth as follows:

Florida Statutes Sec. 2.01; 708.08; 708.9.

STATEMENT OF THE CASE

The Respondent accepts and agrees with the statement of the case as set forth in the brief of Petitioner excepting certain matters recited herein which are factual.

First, the alleged tort: The efforts made by the Respondent to have his wife committed occurred prior to the filing of the divorce petition by the Petitioner.

Second, the statement of the case by the Petitioner wrongfully views the Florida law in that an incompetent person may sue or be sued for divorce but our courts in this State impose the Dead Man's Statute, Florida Statute Annotated 90.05, in that as a rule of evidence, transactions between the parties cannot be recited.

By leave of the Supreme Court of Florida, the ori-

ginal motion to dismiss was made part of the record on appeal and both it and the motion directed to the amended complaint set up the grounds for the cause of dismissal (R 15, R 33).

In all other respects the statement of the case as recited by Petitioner in the Petition for Writ of Certiorari appears to be in order.

ARGUMENT AND REASONS FOR DENYING THE WRIT

(1) It is the contention of the Respondent that this Writ should be denied on the basis that the law is clear and of long standing that neither spouse has a cause of action for tort. The succession of cases in the State of Florida which held this commence with the common law rule as was expressed in **Taylor v. Dorsey,** 19 So2d 876, **Webster v. Snyder,** 138 So. 755, **Corren v. Corren,** 47 So2d 744, **Amendola v. Amendola,** 121 So2d 805.

The common law for centuries, as is reflected in 41 C.J.S. Husband and Wife Sec. 396, had established the doctrine of interspousal immunity. Section 396 thereof states:

> **"At common law neither spouse may maintain an action sounding in tort against the other. This rule applies to injuries both to person and to property. It is usually affirmed that the reason for, or basis of, the rule which denies the right of action is the common law doctrine of the merger or unity of husband and wife, although a public**

policy which seeks to preserve or promote domestic peace and felicity has also been regarded as a reason for, or basis of, the rule." (Emphasis added)

This Court, in recognizing and adopting this rule of interspousal immunity, set forth clearly in **Thompson v. Thompson,** 218 U.S. 611, 31 S.Ct. 111, 112, 54 L.Ed. 1180, that the doctrine would be maintained as was recognized and clearly expressed and that such a far reaching change affecting public welfare and public policy could and should only be done by a legislative body, in clear, unmistakable and concise language. A number of cases in many states support this doctrine of interspousal immunity. See: Thompson v. Thompson, 218 U.S. 611, 54 L.Ed. 1180, 31 S.Ct. 111, 30 L.R.A.(NS) 1153, 21 Ann. Cas. 921, affirming 31 App.D.C. 557, 14 Ann.Cas. 879; Peters v. Peters, 156 Cal. 32, 103 P. 219, 23 L.R.A.(NS) 699; Spector v. Weisman, 59 App.D.C. 280, 40 F2d 792, citing RCL; Webster v. Snyder, 103 Fla. 1131, 138 So. 755, citing RCL; Eddleman v. Eddleman, 183 Ga. 766, 189 SE 833, 109 A.L.R. 877, Henneger v. Lomas, 145 Ind. 287, 44 NE 462, 32 L.R.A. 848; Libby v. Berry, 74 Me 286, 43 Am.Rep. 589; Abbott v. Abbott, 67 Me 304, 24 Am.Rep. 27; David v. David, 161 Md. 532, 157 A. 755, 81 A.L.R. 1100; Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287, 40 L.R.A. 757, 72 Am.St.Rep. 550; Albrecht v. Potthoff, 192 Minn. 557, 257 N.W. 377, 96 A.L.R. 471; Drake v. Drake 145 Minn. 388, 177 N.W. 624, 9 A.L.R. 1064; Strom v. Strom, 98 Minn. 427, 107 N.W. 1047, 6 L.R.A.(NS) 191, 116 Am.St.Rep. 387; Austin v. Austin, 136 Miss. 61, 100 So. 591, 33 A.L.R. 1388; Schaltens v. Schaltens, 230 N.C. 149, 52 SE2d 350; Leonardi v. Leonardi, 21 Ohio App. 110, 153 N.E. 93, citing RCL; Kaczorowski v. Kalkosinski,

321 Pa. 438, 184 A. 663, 104 A.L.R. 1267; State v. Kirby, 167 Tenn. 307, 69 SW2d 886, citing RCL; Lillienkamp v. Rippetoe, 133 Tenn 57, 179 SW 628, L.R.A. 1916 B 881, Ann.Cas. 1917 C 901; Gowin v. Gowin, (Tex.Civ.App.) 264 SW 529, citing RCL; Keister v. Keister, 123 Va. 157, 96 SE 315, 1 A.L.R. 439; Schulz v. Christopher, 65 Wash. 496, 118 P. 629, 38 L.R.A.(NS) 780; Ewald v. Lane, 70 App.D.C. 89, 104 F2d 222, Cert.Den. 308 U.S. 568; Nickerson v. Nickerson, 65 Tex. 281; McKinney v. McKinney, 59 Wyo. 204, 135 P2d 940; Schroeder v. Longnecker, (1947 D.C.Mo.) 7 F.R.D. 9; Callow v. Thomas, 322 Mass. 550, 78 NE2d 637; 2 A.L.R.2d 632; Emerson v. Western Seed & Irrig Co., 116 Neb. 180, 216 NW 297, 56 A.L.R. 327; Coster v. Coster, 289 N.Y. 438, 46 NE2d 509, 146 A.L.R. 702, reh.den. 290 N.Y. 662, 49 NE2d 621; Fehr v. General Acc. F. & L. Assur. Corp., 246 Wis. 228, 16 NW2d 787, 160 A.L.R. 1402. Anno: 43 A.L.R.2d 636 et seq.

(2) Many states have adopted a Married Woman's Separate Property Act. A number of these jurisdictions, by legislative enactment, have vested in the respective spouses the right to sue in tort against the other. This has not been done in Florida, as well as other jurisdictions. The Married Woman's Separate Property Act as enacted by the Florida State Legislature, **Fla.Stat. Anno.** 709.08 and 709.09, clearly omits and fails to reflect any legislative intent to vest in her or, in fact, either spouse, a right to sue in tort. Considering that the majority of jurisdictions uphold the common law except as changed by legislative enactments, it is urged that to entertain the relief herein sought would, under the guise of constitutional protection, usurp the legislative authority of the sovereign states.

CONCLUSION

For the above discussed reasons, the Petition for the issuance of a Writ of Certiorari should be denied.

Respectfully submitted,

PALLOT, SILVER, PALLOT,
STERN & PROBY
Attorneys for Respondent

By SAM I. SILVER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent was served this ..... day of November, 1967, by depositing a copy of the same in the United States Mail with sufficient postage pre-paid to Daniel L. Ginsberg and Harold Ungerleider, Attorneys or Petitioner, Carmen Bencomo, at 420 Lincoln Road, Miami Beach, Florida.

SAM I. SILVER

In The

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No. 534

CARMEN BENCOMO,

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WILL C. BENCOMO,

Respondent

APPENDIX TO BRIEF OF RESPONDENT

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1967

Case No. 35,678

CARMELA BENCOMO, a/k/a CARMEN BENCOMO,
Appellant,

vs.

WILL C. BENCOMO,

Appellee.

(CAPTION OMITTED)

APPENDIX A

MOTION TO DISMISS

COMES NOW the Defendant, WILL C. BENCOMO, by and through his undersigned counsel, and files this his Motion to Dismiss on the following grounds:

1. That the instant action is barred in as far as it is a tort allegedly arising while the parties hereto were man and wife.

2. That the matters alleged in the Complaint are res judicata, having been disposed of in that certain case entitled BENCOMO v. BENCOMO, 65C 1733, a decree having been entered by the Honorable Grady L. Crawford.

3. That said cause of action is barred by the Doctrine of Marital Immunity for that there has been a failure to bring an indispensable party defendant.

WHEREFORE, the Defendant respectfully prays that this cause be dismissed with prejudice at the cost of the Plaintiff.

(CAPTION OMITTED)

ORDER

THIS CAUSE CAME ON TO BE HEARD upon Defendant's Motion to Dismiss, and upon argument of

counsel, and the Court being advised in the premises, accordingly, it is

ORDERED, CONSIDERED, ADJUDGED AND DIRECTED that the Defendant's Motion to Dismiss be and the same is hereby granted, and the Plaintiff is given leave to file an Amended Complaint within ten days from the date of the entry of this Order.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 17th day of June, 1966.

s/ JAMES W. KEHOE
Circuit Judge

APPENDIX B

FLORIDA STATUTES:

Sec. 708.08 Married women's rights; separate property

Every married woman is hereby empowered to take charge of, and manage and control her separate property, to contract and to be contracted with, to sue and be sued, and to, convey, transfer, mortgage, use and pledge her property, real and personal, and to make, execute and deliver instruments and documents of every character, without restraint, without the joinder or consent of her husband, in all respects as fully as if she were unmarried. Every married woman, without the joinder or consent of her husband shall have and may exercise all rights and powers with respect to her separate property, income and earnings, and may enter into, obligate herself to perform, and enforce contracts or undertakings to the same extent and in like manner as if she were unmarried; provided, however, that no deed, mortgage or other instrument conveying or encumbering real property owned by a married woman shall be valid without the joinder of her husband; provided, further, that any claim or judgment against any married woman shall not be a claim or lien against such married woman's inchoate right of dower in her husband's separate property. Laws 1943. c. 21932 Sec. 1.

Sec. 708.09 Same; agreements with husband, power of attorney, etc.

Every married woman may enter into agreements and contracts with her husband, may become the partner of her husband or others, may give a power of attorney

to her husband, and may execute powers conferred upon her by her husband, including the power to execute and acknowledge deeds to property owned by her or by herself and her husband as tenants by the entirety or by her husband. All powers of attorney heretofore executed by a wife to her husband and vice versa, and the execution of all documents executed thereunder, are hereby validated and confirmed. Laws 1943, c. 21696 Sec. 1; Laws 1943, c. 21932, Sec. 2.

Sec. 2.01 Common law and certain statutes declared in force

The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.